RESPONDENT'S MEMORANDUM IN RESPONSE AND IN OPPOSITION TO PETITIONER'S MOTION FOR A HEARING ON THE MERITS OF THE PETITION OF THE DETROIT CITY COUNCIL FOR THE REMOVAL OF THE MAYOR OF THE CITY OF DETROIT FROM HIS OFFICE

INTRODUCTION

Pursuant to the Prehearing Order dated August 11, 2008, Petitioner, the Detroit City Council, and Respondent, The Honorable Kwame M. Kilpatrick, Mayor of the City of Detroit, filed a Motion for a Hearing on the Merits and a Motion to Dismiss or Stay the Proceedings, respectively. Responses to the Motions are due from the parties on or before August 20th and Reply Briefs, if any, by August 25th.

The Prehearing Order also indicates that the Petitioner must "submit sufficient evidence to the Governor establishing grounds for the Respondent's removal from office".

Respondent has objected to the use of the investigation done by Counsel for the Detroit City Council for a number of reasons: First, the report contains not a single citation to any authority, including a lack of reference to the Petitioner's own investigative hearing transcript. The reason for the absence of references to the testimony is obvious when one reviews the testimony: No one testified that the Mayor ever authorized a settlement of the Brown vs. City of Detroit matter for improper reasons. (See Exhibit 1, Special Counsel's Report, annotated by counsel for the Respondent). Second, the conclusions in the report demonstrate a complete lack of understanding of the process undertaken by Council and the administration of the City of Detroit in resolving litigation. Respondent does not suggest that the Petitioner's counsel intended to mislead the Governor; only that the Special

Counsel's Report does mislead, simply because it omits facts of which Special Counsel was not and is not aware. Quite simply the Detroit City Council has not informed their attorney of facts which would undercut their openly political effort to remove the Mayor from his office.

Finally, and most important, the hearings afforded the Mayor no right to cross examine the witnesses nor to introduce any evidence; and the Special Counsel called witnesses in his "investigation" in an attempt to obtain evidence of conclusions that he had already drawn. The investigative hearing was held on April 8-11, 2007. The questioning of the witnesses, again without any cross-examination permitted, was in the nature of a deposition. Accordingly, witnesses answered only the questions they were asked and did not volunteer any additional facts. For this reason, the testimony of the witnesses is incomplete at best.

FACTUAL BACKGROUND

As the Respondent's witnesses will testify, the parties in the Brown case were sent to facilitation to discuss the matter of resolving the outstanding attorneys fee issues. A jury verdict had been rendered which, with costs, interest and attorneys fees, was nearly 9 million dollars. Settlements for both Brown and the other plaintiff in his case, Nelthorpe, as well as for the stand-alone case involving plaintiff Harris, were discussed by the attorneys at the facilitation. In fact, the idea of a global settlement of all of the cases was raised by the attorney for the plaintiffs, Stefani, and a call was made by an attorney from the City's Law Department to the Corporation Counsel, John Johnson, to inquire as to his willingness to entertain a global settlement. Although the parties were not sent to facilitation to discuss the matter of a global settlement, this is not at all unusual. There is no gag order as to what matters opposing attorneys may discuss when they are together. Indeed, open communication is in the best interests of all of the parties.

The prior testimony indicates that during the facilitation, the Facilitator entered the room in which Defendants' counsel (Samuel McCargo, Valerie Colbert-Osamuede and Wilson Copeland) were meeting. McCargo, who represented the Mayor in his official capacity, was called out of the meeting by Facilitator, Val Washington. The other attorneys, Colbert-Osamuede and Copeland, were left in the room and continued their discussion. It was at that point, when McCargo was outside with Washington, that he was told of the Motion Stefani was threatening to file.

When the offer of a global settlement was made, Corporation Counsel John Johnson was called by Colbert-Osamuede, and asked to come to the facilitation to discuss resolution of all of the cases. This was done BEFORE Colbert-Osemuede was told by McCargo that Stefani claimed to have the text messages. Once Ms. Colbert-Osemeuede learned that Stefani claimed to have the text messages, she again called Johnson. Johnson, upon arriving, discussed the global settlement with Colbert-Osamuede and McCargo. Since he believed that the text messages contained negative remarks about individuals in the political community, coupled with the global settlement and the expressed reluctance of the Detroit City Council to approve additional outside attorney fees, Johnson decided that the case should be settled. Again, the issue at that point was embarrassing remarks allegedly made by the Mayor about people in the political community, NOT an intimate relationship with his Chief of Staff.

There is no evidence whatsoever that the decision made by John Johnson, on October 17th , to recommend settlement of the case was in any way influenced by the Mayor of the City of Detroit. In fact, it may well be the case that the Mayor's decision (if any) to settle the Brown case was made in September, shortly after the jury verdict. Special Counsel simply did not ask the right questions and so did not obtain any information about what the Mayor may have communicated to anyone prior to October 17th.

After the facilitation adjourned and the parties all convened at Stefani's office for the purpose of drafting a tentative settlement agreement. They discovered that Stefani had already prepared a draft, which they began to modify. For instance, Stefani had proposed to destroy the text messages. That idea was rejected by the Defendants' attorneys. None of the lawyers had sought their client's advice as to the terms of the possible agreement on October 17, 2007. It was a draft. This initial draft has become, in the minds of the City Council, evidence that there was deception in the process of obtaining their approval of the settlement amount.[1]

On October 18th, the Law Department attorney, Ms. Colbert-Osemuede, appeared before Council seeking their approval, as she did in all cases in which she recommended settlement, for the amount of money to be offered to Plaintiffs. The amount was approximately one million dollars less than was owed to the Plaintiffs at the time that she sought the approval from Council. As in all cases, the actual settlement agreement was not produced to Council.

On October 27, 2007, the Mayor rejected the settlement agreement[2]. The case was settled without any confidentiality provision at all. Thus, from October 17th to and including December 5th, Stefani was free to reveal any and all of the text messages to anyone he chose to tell. There was no impediment to his doing so until the Confidentiality Agreement was finalized on December 5, 2007[3].

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[1] The Detroit City Charter provides that "no civil litigation of the City may be settled without the consent of the City Council". There is no procedure specified to bring a matter to Council and, in fact, City Council only approves the settlement amount not any of the other terms of the settlement: This was true before the Brown case and it is true today. Moreover, Council is never presented with any of the final settlement documents in any case.

[2] Special Counsel insists that this rejection was due to an improper motive; to wit, to hide the content of the text messages. In fact, the removal of the so-called confidential provisions of the agreement was due to the fact that Christine Beatty, who was not a party in the Brown case, had to be a party to a confidentiality agreement in order to safeguard her personal banking records. The documents, whether text messages, banking records or personal medical records of Brown et al, were never considered by the jury in the Brown case. This made the inclusion of them in the Brown settlement agreement unnecessary and perhaps even irrelevant.

[3] By December 5th, Stefani and his clients had been paid all of the settlement proceeds and fees.

Special Counsel, William Goodman, in his Motion for Hearing on the Merits, attempts to respond to a Motion to Dismiss or For a Stay of Proceedings which he had never seen. In his usual conclusory style, he insists that government is paralyzed in Detroit and that only removal of the Mayor will save the City. Goodman also references his Special Counsel's Report, another tome most notable for its complete lack of evidentiary value. Once again, as is his practice, Goodman references letters from the Governor's attorney, letters to and from him and counsel for the Mayor BUT NOT ONE SINGLE REFERENCE TO THE TRANSCRIPT THAT HE CLAIMS PROVES THAT "OFFICIAL MISCONDUCT" was committed by the Mayor in settlement of the Brown case.

The issue of the need for a two-third's vote in the adoption of any resolution that relates to a removal from office has been thoroughly briefed. Goodman's protestation notwithstanding, the Council is required to formulate rules for conduct of business, it did so, and those rules require a two-thirds vote for something as trivial as removing one of them from a committee chairmanship[4].

An action filed by the Mayor and the City of Detroit against the City Council determined on August 18th that the Detroit City Charter does not permit the Council to forfeit the office of Mayor and that neither of the provisions cited by the Council allow forfeiture in penalty for violation of those provisions. (Exhibit 2, the transcript of the decision of the Court has been ordered and will be forwarded when it is received). In the context of this adverse ruling, the Detroit City Council and the Detroit Free Press have begun to exert enormous pressure upon the Governor to do what they are legally not entitled to do, remove the Mayor from his office. The headlines of August 19, 2008 read:

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[4] Judge Robert Zilkowski, on August 18th, found that Council could choose between whether to apply the majority vote referenced in the Charter or the two-thirds vote required by its own rules. The judge also opined that substantive rules of procedure could be enacted after the conduct that is the basis for the removal proceedings, so long as the rules were made before the actual hearing. The Council was not allowed to proceed with forfeiture hearings for other reasons and vowed to appeal. Should they appeal, Respondent herein will cross appeal on these two issues, which appear to be wrongly decided.

"Mayor's victory puts Granholm in control. Hearing by governor is quickest option left as decision on it nears".

This headline is no surprise when one recalls the Editorial published in the Detroit Free Press just last weekend which insisted that the Mayor had "lied" to Council and was guilty of misconduct. Without any concern for fairness, the editor of the Free Press said

"The sooner the process ends—and, hopefully, the sooner it gets the lying, cheating, stealing Kilpatrick out of office—the better".

The complete lack of journalistic integrity shown by the Detroit Free Press is exceeded only by its effort of several years to undermine the Mayor and to convince the public that Mayor Kilpatrick is a criminal, who has wild parties and kills people. See Exhibit 3, the headlines of the Detroit Free Press over the past eight months. The constitutional guarantee of freedom of the press was not intended to allow individuals who serve as employees of the print media to work out their own political agenda through the use of their newspapers. Yet, that is precisely what is happening in this case.

The legal argument, as advanced by the Petitioner, is <u>not</u> (as Mr. Goodman suggests) that the petitioner cannot "adequately present his position in this proceeding without testifying and thereby implicating Fifth Amendment issues", it is instead that:

<u>GOVERNMENT MAY NOT IN A CIVIL OR ADMINISTRATIVE PROCEEDING COMPEL TESTIMONY WHICH MAY IMPLICATE THE FIFTH AMENDMENT BY THE THREAT OF POTENT SANCTIONS, PARTICULARLY WHERE, AS HERE, THE GOVERNOR HAS NO</u>

ABILITY TO COMPEL WITNESSES TO TESTIFY AND THUS, THE ONLY WITNESS THAT RESPONDENT CAN CONTROL IS HIMSELF.

In his Response memorandum, counsel Goodman finally cites actual cases but they are easily distinguishable from the instant matter. First, the cases are cited for the proposition that a civil proceeding and *coincidentally related* criminal proceeding may be heard at the same time. This is not a case in which the criminal proceeding is in any way coincidental to the administrative proceeding(s).

Attached as Exhibit 4 is the document referencing the charges filed by the Wayne County Prosecutor: As this document clearly reflects, in Counts 3 and 4, the Mayor is charged with "misconduct in office", a "common law indictable offense". The charges filed by the Prosecutor requires proof that the Mayor "misused public funds for personal gain", the personal gain being the hiding of "the true nature of their relationship".[5] The language quoted above, as to what is before the Governor, is precisely the language used by the Detroit City Council and its Special Counsel at page 7 of the Special Counsel's Report. Most importantly, the statute that allows the Governor to conduct these removal proceedings, MCL 168.327, Goodman himself admits in his Motion for a Hearing on the Merits, is based upon a determination of official "misconduct" in office.

Petitioner's attempt to characterize the Prosecutor's case as based upon the Mayor's conduct "during the Brown and Nelthorpe trial" is dishonest. See Exhibit 4 at count 4, which specifically refers to the allegations of a "corrupt motive" in "authorizing the settlement of the Gary Brown/Nelthorpe and Harris litigations".

The only thing perhaps more dishonest than Petitioner's effort to mislead the Governor by asserting that somehow the Prosecutor's charges are unrelated to the

[5] Leaving aside for the moment the fact that Judge Ziolkowski has ruled that, under the Detroit City Charter, the Mayor may not be removed in a forfeiture proceeding, for this conduct, even if the allegations were true (and they are not), there is simply no remotely plausible argument to be made that the Prosecutor's case is "coincidentally related" to the Governor's removal proceeding.

issue of the settlement of the Brown case(s) , is the citation of cases that involve private parties and low level employees (not elected officials chosen by the people). Relying almost exclusively on the case of Hart v. Ferris State College, 557 F. Supp. 1379 (1983), Petitioner asserts the incredible view that a college holding a disciplinary proceeding against a student is the equivalent of the Governor holding a removal proceeding against an elected Mayor.[6] Significantly, in Hart, the plaintiff submitted NO authority to the court in support of her request to enjoin the disciplinary hearing. See Hart at page 9. Given the court's analysis, which was based upon the likelihood of success on the merits, the court correctly reasoned that Plaintiff's failure to submit any authority at all, for her request to enjoin the college from conducting the disciplinary hearing, was fatal to her request.

The essential point that Petitioner refuses to address is that this case is unlike any other that he cites in one among many ways: The necessary testimony is that which relates to the element of intent. This case is about what the Mayor thought and not about what he did. Indeed, it is his job to resolve cases brought against the City. As CEO, he delegates that authority to others, including his Corporation Counsel. It is not difficult to imagine the literal paralysis that could obtain in cities across the State of Michigan from a ruling by a Governor removing a Mayor for settling a case against his city. Whatever the political forces, no Governor should position himself or herself to second guess the decision of an elected official with regard to resolution of employment litigation.

It is undisputed that there is no direct evidence of any improper "intent" in the decision to settle the Brown case: Petitioner suggests that the timeline between

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[6] In addition to a number of inapplicable string cites, Petitioner also cites Bajis v. City of Dearborn, 151 Mich App 533 (1986) for the proposition that official misconduct is "any unlawful behavior in relation to the duties of his office..." Bajis concerned a firefighter who admittedly made obscene calls during work hours from a work phone. The Court agreed that the placement of these calls during work hours from a work phone constituted acts in "direct contravention of department orders and inconsistent with his responsibilities to the public for their safety and welfare". The fact that the fire department had rules prohibiting the conduct charged was an important factor. Here, Council has no such rules and in fact, their attorney, in his Special Counsel's Report, recommends that they adopt rules relating to the settlement of cases.

the threat of exposure and the settlement itself proves that the case would not have been settled but for the threat. No conclusion could be more ridiculous. Goodman offers no evidence that the Mayor himself intended anything but to accept the recommendations of his attorneys. The entire process is an exercise in burden-shifting. Essentially, Goodman is saying "I have concluded that your intent was improper, prove me wrong". There is no way to prove a negative, except to deny it and to be believed in that denial. In this case, that means the Respondent must testify on the ultimate issue.

The obvious issues with the Respondent testifying at the Governor's administrative hearing becomes even more fatal to a defense when he is confronted with a Special Counsel's Report which contains questions asked by the Special Counsel only. No cross examination was permitted and no witnesses were allowed to be called by the Mayor. Coupled with the fact that the Governor has indicated that she cannot compel any witnesses to testify, the Governor is conducting a completely one-sided hearing where the Respondent's hands are tied behind his back.[7]

CONCLUSION

The statute that permits the Governor to remove a local elected official likely never contemplated a situation like the one with which we are concerned: Certainly, no one could have foreseen a situation as one-sided as this one. City Council undertook a media-inspired and politically motivated effort to remove the Mayor. That effort cost the taxpayers hundreds of thousands of dollars and came to an end when a judge ruled that Council had no authority to hold the forfeiture hearings.

[7] State Bar Grievance procedures were initiated by the Council and are pending against the very lawyers who testified in the Investigative hearings by City Council. This chills the willingness of those lawyers to appear and testify, which means that Council has its testimony but the Mayor will be restricted to those witnesses who are willing to appear.

Now, the Council seeks another bite at the rotten apple: Having held its own hearings, it seeks to have the Governor remove the Mayor without any fear of contradiction as to the facts as determined by Council

Even in an administrative proceeding, all parties are entitled to due process: The fact that the only witness for the Mayor will have to be the Mayor himself is fatal to the most minimal due process requirements. The Respondent, Mayor of the City of Detroit, Kwame M. Kilpatrick requests that the Governor dismiss these proceedings or, in that alternative, that they be stayed pending the outcome of the Prosecutor's charges (during which he will be allowed to subpoena witnesses).

Respectfully Submitted:

By: 

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